

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Telephone Number Portability)	CC Docket No. 95-116
)	
Initial Regulatory Flexibility Analysis)	
_____)	

**SPRINT NEXTEL COMMENTS IN RESPONSE TO THE INITIAL
REGULATORY FLEXIBILITY ANALYSIS**

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Summary

1. The *Intermodal Porting Order* does not impose a significant economic impact on small entities. A Regulatory Flexibility Act analysis requires a comparison between the rules adopted in the *Order* with the requirements imposed by the statute. Congress has already imposed a porting obligation on rural local exchange carriers (“LECs”) and the costs of complying with this original mandate are not properly a part of this regulatory flexibility analysis. The only issue before the Federal Communications Commission (“Commission” or “FCC”) is whether the *Intermodal Porting Order*’s alleged expansion of the porting obligation has a significant economic impact on rural carriers.

Because rural carriers already bear the financial burden of local number portability, the incremental costs associated with intermodal porting are minimal if any. Other concerns identified by the Commission are also not properly considered in this flexibility analysis. A rural LEC’s loss of customers, which is a result of the competitive objectives of the Telecommunications Act of 1996 (“the Act”), is not a legitimate factor for the FCC to consider. Any new transport costs are caused not by the *Intermodal Portability Order*, but by the existence of competition and the reciprocal compensation statute. Accordingly, these costs are unrelated to the *Intermodal Porting Order* and need not be considered here.

2. The available significant alternatives do no require any modification of the *Intermodal Porting Order*. There are two significant alternatives to a Rural LEC’s porting obligation, but neither alternative requires a modification of the *Intermodal Porting Order*. The two alternatives are filing (a) a forbearance petition with the FCC under Section 10 of the Act or (b) a rural exemption petition with the State commission under Section 251(f) of the Act. Because it is rural LECs that will decide whether to file such petitions, these alternatives are separate from, and have no bearing on, the *Intermodal Porting Order*.

3. The FCC should supplement the Statement of Need section of its flexibility analysis. The FCC is correct: number portability promotes competition. However, the flexibility analysis should also recognize that the reason that the FCC had to adopt its *Intermodal Porting Order* is because rural LECs refused to comply with rules that the FCC adopted years ago.

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Sprint Nextel Corporation (“Sprint Nextel”) submits these comments in response to the Initial Regulatory Flexibility Analysis (“RFA”) the Federal Communications Commission (“Commission” or “FCC”) released on April 22, 2005 in connection with the rules adopted in the *Intermodal Porting Order*.¹

I. THE INTERMODAL PORTING ORDER DOES NOT IMPOSE A SIGNIFICANT ECONOMIC IMPACT ON SMALL ENTITIES

The Regulatory Flexibility Act (“Act”) requires agencies to consider whether a new rule would impose a “significant economic impact” on small entities.² The *Intermodal Porting Or-*

¹ See Public Notice, *Federal Communications Commission Seeks Comment on Initial Regulatory Flexibility Analysis in Telephone Number Portability Proceeding*, CC Docket No. 95-116, FCC 05-87, 20 FCC Rcd 8616 (April 22, 2005), published in 70 Fed. Reg. 41655 (July 20, 2005)(“Initial RFA”). See also *Telephone Number Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues*, CC Docket No. 95-116, *Memorandum Opinion and Order*, FCC 03-284, 18 FCC Rcd 23697 (Nov. 10, 2003)(“*Intermodal Porting Order*”), *aff’d in part, remanded in part* *USTA v. FCC*, 400 F.3d 39 (D.C. Cir. 2005).

² See 5 U.S.C. § 605(b). See also Small Business Administration, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act*, at 3 (May 2003)(“SBA Guide”)(“The RFA requires only that agencies determine, to the extent practicable, the rule’s economic impact on small entities.”).

der does not impose a “significant economic impact” on any small entity, including rural local exchange carriers (“LECs”).

According to the Small Business Administration (“SBA”), for purposes of a regulatory flexibility analysis, “the relevant economic ‘impact’ is the impact of compliance.”³ Because rural LECs are already required by statute to provide number portability, the relevant economic impact inquiry necessarily involves a comparison of the impact of the rules adopted in the *Intermodal Porting Order* with the requirements imposed by Congress. When viewed from this perspective, the FCC’s *Intermodal Porting Order* imposes no significant economic impact on rural carriers.

The Commission states that “requiring porting *beyond* the wireline rate center boundaries *could* impose compliance burdens on small entities.”⁴ According to the initial flexibility analysis, by making porting more widely available, this requirement “may increase the amount of telephone numbers that small carriers may be required to port.”⁵ Sprint Nextel recognizes there are legitimate costs related to implementation of intermodal porting. The Commission’s analysis of the potential cost impacts of its Order is flawed, however, because the *scope* of intermodal porting (broad or narrow) will have little if any impact on rural LECs:

- Rural LECs do not need to “update” porting procedures because the scope of the porting obligation (narrow or broad) has no effect on already existing procedures;
- Rural LECs do not need to “upgrade” any software, because the porting software is the same, regardless of the scope of intermodal porting.

³ See *SBA Guide* at 77.

⁴ *Initial RFA* at 3 ¶ 10.

⁵ *Id.* at 3-4 ¶10.

- Any “increased” transport costs are caused by competition and existing inter-connection rules; and, regardless, rural LEC transport costs are the same whether a broad or narrow definition of porting is utilized.
- It is not likely that a rural LEC serving 1,000 or 2,000 customers would have to add any employees because the scope of intermodal porting is broader rather than narrow.

In addition, to the extent costs are volume-sensitive, the SBA has told the Commission that rural LECs have “received a very low volume of porting requests”:

[T]he requests for an intermodal number ports is [*sic*] extremely rare in rural areas according to small telephone companies.⁶

In other words, if rural LEC porting volumes are “very low” and “rare” as SBA states, then the volume-sensitive costs cannot possibly impose a “significant economic impact” on rural LECs.

Moreover, even if it could be shown that porting *beyond* the rate center causes rural LECs to incur additional costs as compared to narrower intermodal porting, the Commission has provided rural LECs with a means for full cost recovery that significantly mitigates any economic impact of compliance.⁷ Indeed, those LECs that have implemented porting since the *Intermodal Porting Order* was released are including both their wireline and intermodal costs in their tariff filings.⁸ In short, the Commission fully expects LECs to avail themselves of the cost recovery mechanism in place and to include both intramodal and intermodal costs when submitting their tariff and cost filings for review.⁹

⁶ SBA Comments at 5 and 7 (Nov. 17, 2004).

⁷ See 47 C.F.R. 52.33(a).

⁸ See, e.g., *LNP Cost Recovery Waiver Order*, 19 FCC Rcd 6800 (2004); *Sprint LNP Cost Recovery Waiver Order*, 19 FCC Rcd 23962 (2004).

⁹ Of course, rural LECs always retain the flexibility to petition the FCC to change or waive its portability cost recovery rules.

A. AN INCUMBENT’S LOSS OF CUSTOMERS IS NOT A LEGITIMATE CONSIDERATION FOR THE COMMISSION

The initial flexibility analysis states that the requirements of the *Intermodal Porting Order* “may cause small or rural carriers to lose customers.”¹⁰ Sprint submits that an incumbent carrier’s loss of customers is not a factor that the Commission may legitimately consider (even if it ignores SBA’s statement that rural LEC porting volumes are “very low”). Moreover, intermodal portability works both ways, allowing wireline carriers to win over wireless customers without burdening those customers with the need to change their telephone numbers. If wireline carriers present a compelling competitive alternative to wireless service, they will greatly benefit from intermodal portability.

The central purpose of the 1996 Act is to “to promote competition . . . in order to secure lower prices and higher quality services for American telecommunications consumers.”¹¹ In this regard, “Congress has recognized that number portability will lower barriers to entry and promote competition in the local exchange market”:

[T]he Senate Committee on Commerce, Science, and Transportation concluded that the “minimum requirements [for interconnection set forth in new section 251(b), including number portability,] are necessary for opening the local exchange market to competition.” Likewise, the House of Representatives Committee on Commerce determined that “the ability to change service providers is only meaningful if a customer can retain his or her local telephone number.”¹²

The Commission has further confirmed that number portability is “essential to meaningful competition in the provision of local exchange services.”¹³

¹⁰ Initial RFA at ¶ 11.

¹¹ Telecommunications Act of 1996, Pub. L. No. 104-04, Purpose Statement, 110 Stat. 56, 56 (1996).

¹² *First LNP Order*, 11 FCC Rcd at 8354-55 ¶ 2.

¹³ *Id.* at 8367 ¶ 28.

The Commission has acknowledged that rural LECs are “virtual monopolists” and that the “basic premise of the 1996 Act was that LECs would lose their market share.”¹⁴ Congress also made clear that the 1996 Act was designed to give residents of rural America the same competitive choices that are available to customers in urban areas.¹⁵ As the Commission has recognized, its “primary objective” should be to “speed service to the public in a manner that enhances competition in both rural and urban areas.”¹⁶ And, as now Chairman Martin has stated, intermodal porting in rural areas provides “important consumer benefits by promoting competition in the wireline telephone market.”¹⁷

The Commission has squarely recognized that the “focus of our porting rules is on promoting competition, rather than protecting individual competitors.”¹⁸ Accordingly, the Commission may not legitimately consider a rural LEC’s loss of customers due to porting. Indeed, if the Commission considers a rural LEC’s loss of customers, it must additionally consider the additional customers that rural LEC competitors will gain from porting, because the benefits of competition are reciprocal and consistent with the very purpose of the 1996 Act.

¹⁴ FCC Brief in Opposition to Emergency Motion for Stay, No. 03-1414, at 18-19 (D.C. Cir., Nov. 26, 2003).

¹⁵ See 47 U.S.C. § 254(b)(3). See also *id.* at § 309(j)(3)(A) (Public interest is served by promoting “the development and rapid deployment of new technologies, process, and services for the benefit of the public, including those residing in rural areas.”).

¹⁶ *Nextel Petition Notice*, 15 FCC Rcd 2104 (2000). See also *Northstar Reconsideration Order*, 19 FCC Rcd 3015 at ¶ 6 (2004) (“[T]he requisite public interest may be found in the increase in service or competition to rural, underserved areas.”); *Universal Service Recommended Decision*, 18 FCC Rcd 2943, 2971 ¶ 71 (2002) (Public interest is not served when it would “likely reduce competition in rural and high cost areas.”); *Universal Service Recommended Decision*, 16 FCC Rcd 6153, 6217 (2000) (“Congress did not intend to deny rural customers the benefits of competition.”);

¹⁷ Separate Statement of Commissioner Kevin J. Martin, *FCC Clears Way for Local Number Portability Between Wireline and Wireless Carriers* (Nov. 10, 2003).

¹⁸ *Intermodal Porting Order*, 18 FCC Rcd at 23708 ¶ 27.

B. THE RURAL LEC COMPLAINT OVER TRANSPORT COSTS IS NOT RELATED TO THE IMPLEMENTATION OF LNP AND IS THEREFORE NOT A SIGNIFICANT ECONOMIC IMPACT

Rural LECs complain that if one of their customers ports his or her number to a wireless carrier, they would incur additional costs to transport the call to the wireless carrier network and be required to compensate the wireless carrier for its costs of call termination. These costs, however, are unrelated to number portability. These costs are rather the result of *preexisting* obligations under the Act and implementing FCC rules governing interconnection and reciprocal compensation. The Commission “declined to address [this] issue” in the *Intermodal Porting Order*, determining that this rural LEC complaint is “outside the scope” of the proceeding.¹⁹ Indeed, on appeal, the FCC acknowledged that these were “long standing interconnection rules.”²⁰ Rural LECs did not challenge this Commission decision, and they have thus waived this argument.²¹ Despite this waiver, the initial flexibility analysis asks for comment on these transport costs (but not the reciprocal compensation costs for call termination).²²

Rural LECs admittedly incur transport and termination costs when they lose a customer to competition, whether or not their former customer took advantage of number portability. But these costs are incurred, not as a result of the statutory number portability requirement, but due to the existence of competition and the reciprocal compensation statute. Indeed, rural LECs incur the identical transport and call termination costs if they send a call to a wireless customer with a

¹⁹ See *Intermodal Porting Order*, 18 FCC Rcd at 23709 n.75 and 23713 ¶ 40.

²⁰ FCC Brief, *United States Telecom Ass’n v. FCC*, Nos. 03-1414, 1443, at 32, 33 (D.C. Cir., filed July 9, 2004).

²¹ See *USTA v. FCC*, 400 F.3d at 34 (Rural LECs “do not challenge the merits of the order”); *id.* at 39 (“[T]he petitioners do not challenge the substantive reasonableness of the rule.”). Notably, the court in the *Wireless Portability Order* appeal rejected the rural LEC argument that the FCC erred in not addressing this same transport issue. See *Central Texas Coop. v. FCC*, 402 F.3d 205, 215-16 (D.C. Cir. 2005).

²² See Initial RFA at ¶ 10.

non-ported local telephone number, just as they receive compensation for transport and termination of incoming mobile-to-land calls. Thus, rural LECs cannot credibly assert that, in providing number portability to wireless carriers as Section 251(b)(2) explicitly requires, they would incur any new or “significant economic burden.”

SBA has incorrectly asserted that “[n]either the FCC nor the industry has determined who pays for the transport of porting numbers when they must be routed over a third carrier.”²³ The only “authority” SBA cites in support of this statement is the position of the National Telecommunications Cooperative Association (“NTCA”).²⁴ The NTCA, however, has told the Commission that “the carrier that originates the call will pay for the transiting function.”²⁵ In other words, contrary to SBA’s assertion, NTCA has conceded that for land-to-mobile calls, rural LECs are responsible for paying the costs of transporting their calls to wireless networks. This contradiction is noteworthy as a stark example of rural LECs using the alleged ambiguity of interconnection compensation rules to their advantage — claiming increased interconnection costs when it suits their advocacy to avoid intermodal portability, but denying they have any such obligation when it comes to interconnection negotiations/arbitrations.²⁶

In fact, governing interconnection rules are not ambiguous as SBA suggests, and it was Congress that established these rules. Congress made very clear in Section 251(a) of the Act that

²³ SBA Reply Comments at 7 (Feb. 4, 2004). *See also* Initial RFA at n.20.

²⁴ *See* SBA Reply Comments at 7 n.32.

²⁵ National Telecommunications Cooperative Association, *Bill and Keep: Is It Right for Rural America?* (March 2004), *appended to* NCTA Ex Parte, CC Docket No. 01-92 (March 10, 2004)(“NTCA White Paper”).

²⁶ This rural LEC contradiction once again serves as evidence of the need for the FCC to reform the intercarrier compensation regime; or, at a minimum, to issue clear and final rules on interconnection, starting with long overdue action on Sprint’s pending Routing and Rating Petition. *See* Sprint Petition for Declaratory Ruling, CC Docket No. 01-92 (May 9, 2002); Public Notice, *Comment South on Sprint Petition for Declaratory Ruling Regarding the Routing and Rating of Traffic by ILECs*, DA 02-1740 (July 18, 2002), 67 Fed. Reg. 51581 (Aug. 8, 2002).

wireless carriers can choose to connect indirectly with other carriers, including rural incumbent LECs,²⁷ and the Commission has confirmed that indirect interconnection is permissible in the porting context as well.²⁸ As courts have noted, if interconnection is indirect, which rural LECs concede is “cost-efficient” for their exchange of traffic with wireless carriers,²⁹ then the interconnection point necessarily is “outside of their respective networks”:

Under the Act, wireless carriers can choose to interconnect indirectly that is, outside of [the rural LECs’] respective networks.³⁰

In addition, Section 251(b)(5) imposes on rural LECs the independent “duty” to establish “*reciprocal* compensation arrangements for the transport . . . of telecommunications.”³¹ The plain language of this statutory command requires that wireless carriers and rural LECs share the costs of the transporting traffic between their respective networks.³² As the FCC’s own General Counsel has stated:

²⁷ 47 U.S.C. § 251(A)(1).

²⁸ See *First LNP Reconsideration Order*, 12 FCC Rcd at 7305 ¶ 121 (“[T]o provide number portability, carriers can interconnect either directly or indirectly as required under Section 251(a)(1).”).

²⁹ See NTCA White Paper at 41 (“Since all carriers in a service area or market must at some point connect to the area tandem, there is efficiency in utilizing the tandems to route calls to other carriers instead of building a direction connection to each carrier. . . . [T]he most feasible and cost-efficient option for most rural ILECs is to use the RBOC’s tandem for transiting functions.”).

³⁰ *Central Texas Coop v. FCC*, 402 F.3d 205, 215 (D.C. Cir. 2005). JSI’s assertion – “the Act does not require rural LECs to route calls to an out-of-service area POI” (JSI Ex Parte at 14 (May 2, 2005)) – is not simply unexplained and unsupported, it is also inconsistent with every federal court decision addressing the issue. See, e.g., *Atlas Telephone v. Oklahoma Corporation Comm’n*, 400 F.3d 1256, 1265-66 (10th Cir. 2005).

³¹ See 47 U.S.C. § 251(b)(5)(emphasis added).

³² See also *Local Competition Order*, 11 FCC Rcd 15499, 15781 ¶ 553 (1996)(“[T]he incumbent and the new entrant are co-carriers and each gains value from the interconnection agreement. Under these circumstances, it is reasonable to require each party to bear a reasonable portion of the economic costs of the arrangement.”).

Under current intercarrier compensation rules, then, when a wireless customer calls a rural LEC customer, the wireless carrier is responsible for transporting the call and paying the cost of this traffic. And, conversely, when a rural LEC customer calls a wireless customer, the rural LEC is responsible for transporting the call and paying the cost of this transport.³³

This LEC duty to transport traffic and pay reciprocal compensation also extends to situations in which the rural LEC relies on intermediary carriers. As the Tenth Circuit Court of Appeals held recently, “the RTCs’ [Rural Telephone Companies’] argument that CMRS providers must bear the expense of transported RTC-originated traffic on the SWBT network must fail.”³⁴

In summary, SBA’s assertion that the FCC has not determined who pays the transport of calls originating on rural LEC networks is not simply unsupported, but is also incompatible with the plain language of statutory requirements. Moreover, since rural LECs have the duty to transport their customers’ calls to a wireless network within the LATA (whether or not porting was utilized), rural LECs cannot credibly claim that the *Intermodal Porting Order* imposes a new or “significant economic burden” on them.

* * *

The Regulatory Flexibility Act specifies that an agency may dispense with the preparation of a final flexibility analysis “if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”³⁵

Given that the SBA has effectively conceded that rural LECs do not face a “significant economic

³³ FCC Brief, *United States Telecom Ass’n v. FCC*, Nos. 03-1414, 1443, at 35 (D.C. Cir., filed July 9, 2004). JSI’s recent statement – entirely unsupported – that existing rules affirmed on appeal impose a “disproportionate burden” regarding transport (*see* JSI Ex Parte at 7 (May 2, 2005)) – is not simply unsupported, but is also factually inaccurate.

³⁴ *Atlas Telephone v. Oklahoma Corporation Comm’n*, 400 F.3d 1256, 1266 (10th Cir. 2005).

³⁵ 5 U.S.C. § 605(b). *See also* SBA Guide at 72 (“The exception [to the preparation of a Final RFA] is when the agency certifies the rule will not have a significant economic impact on the affected entities.”).

effect” from intermodal porting (because porting volumes are “very low”), the Commission could readily determine that the preparation of a final flexibility analysis is unnecessary under the Regulatory Flexibility Act.³⁶

II. THE AVAILABLE SIGNIFICANT ALTERNATIVES REQUIRE NO MODIFICATION OF THE COMMISSION’S ORDER

If, despite the arguments outlined above, the Commission does determine that its *Intermodal Porting Order* imposes a significant economic impact on rural carriers, it must then review in the final flexibility analysis any “significant alternatives to the rule.”³⁷ An agency need not consider significant alternatives where “uniform requirements are mandated by statute.”³⁸

In this regard, “Congress emphasized that the [Flexibility Act] should not be construed to undermine other legislatively mandated goals.”³⁹ Congress has specifically declared that agencies need consider only those significant alternatives which do “not conflict with the stated objectives of applicable statutes.”⁴⁰

This provision does not require that an agency adopt a rule establishing different compliance standards, exemptions, or any other alternative to the proposed

³⁶ The Regulatory Flexibility Act does require the FCC to publish this certification in the Federal Register. *See* 5 U.S.C. § 605(b).

³⁷ 5 U.S.C. § 604(a)(5). The Regulatory Flexibility Act does not require agencies to address “every alternative, only significant ones.” *SBA Guide* at 74. *See also Associated Fisheries v. Daley*, 127 F.3d 104, 115 (1st Cir. 1997) (“[S]ection 604 does not require that an FRFA address every alternative, but only that it address significant ones.”).

³⁸ *SBA Guide* at 76. It is important to emphasize that the RFA is “a procedural rather than substantive agency mandate.” *Alenco Communications v. FCC*, 201 F.3d 608, 625 (5th Cir. 2000). *See also U.S. Cellular v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001). Specifically, the Act does “not command an agency to take specific substantive measures, but, rather, only to give explicit consideration to less onerous options.” *Associated Fisheries*, 127 F.3d at 114.

³⁹ *Associated Fisheries*, 127 F.3d at 114.

⁴⁰ Small Business Regulatory Enforcement Fairness Act of 1996, PUB. L. NO. 104-121, Findings and Purposes, § 2(a)(7). *See also* § 2(b)(“It is the purpose of this Act . . . that agencies shall endeavor, *consistent with the objectives of the rule and of applicable statutes*, to fit regulatory and informational requirements to the scale of the businesses.”)(emphasis added).

rule. . . . Evidence that such an alternative would not have accomplished the stated objectives of the applicable statutes would sufficiently justify the rejection of the alternative.⁴¹

Based upon these standards, there are two available “significant alternatives” to a rural LEC’s statutory obligation. Neither of these alternatives, however, requires modification of the *Intermodal Porting Order*. First, RLECs may petition the FCC for forbearance from application of the rule if they can demonstrate the requisite conditions apply. Second, RLECs may use the 251(f) process outlined by Congress to seek relief at the state level. The other alternatives that have been previously raised by rural carriers are not valid or feasible options and can be rejected by the Commission.

A. FORBEARANCE OF THE STATUTORY PORTABILITY REQUIREMENT

Rural LECs are required by statute to port their customers’ telephone numbers to other carriers, including wireless carriers.⁴² The Commission, however, possesses the authority to forbear from applying this statute to rural LECs under specified circumstances.⁴³ Despite the existence of this alternative, no rural LEC has ever sought such relief.

It is understandable that rural LECs have not filed a forbearance petition regarding their statutory portability obligation. To grant such a petition, the Commission would have to find that forbearance is “not necessary for the protection of consumers” and would be “consistent

⁴¹ 126 Cong. Rec. at S21459-60 (1980).

⁴² See 47 U.S.C. §§ 153(20); 251(b)(2). See also *First LNP Reconsideration Order*, 12 FCC Rcd 7236, 7303 ¶ 117 (1997) (“[T]here is no exemption for rural LECs of their number portability obligations.”); *id.* at 7303 ¶ 116 (“[W]e find no statutory basis for excusing such a [rural] LEC from its obligations to provide number portability.”); *First LNP Order*, 11 FCC Rcd 8352, 8357 ¶ 8 (1996) (Because “CMRS carriers are telecommunications carriers under the 1996 Act, . . . LECs are obligated under the statute to provide number portability to customers seeking to switch to CMRS carriers.”).

⁴³ See 47 U.S.C. § 160.

with the public interest.”⁴⁴ The Commission, however, has already found that exempting rural LECs from their LNP obligation would “hamper the development of competition in areas served by smaller and rural LECs that competing carriers want to enter.”⁴⁵ In addition, over one million LEC customers have already ported their numbers to wireless carriers in the short 21 months since intermodal portability became available.⁴⁶ Clearly, LEC customers have found intermodal porting to be of value.

The important point, though, is that this “significant alternative” is under the control of rural LECs and requires no modification to the *Intermodal Porting Order*. Any LEC can submit a forbearance petition at any time.⁴⁷ Thus, this alternative is separate from, and has no bearing on, the *Intermodal Porting Order*.

B. THE RURAL EXEMPTION UNDER SECTION 251(F)(2)

Congress established another alternative specifically for rural LECs. Section 251(f)(2) authorizes a state commission to suspend or modify a rural LEC’s portability obligation if a state commission finds that such relief is “necessary (i) to avoid a significant adverse economic impact on users of telecommunications services generally; (ii) to avoid imposing a requirement that is unduly economically burdensome; or (iii) to avoid imposing a requirement that is technically

⁴⁴ *Id.* §§ 160(a)(2), (3).

⁴⁵ *LNP Reconsideration Order*, 12 FCC Rcd at 7302 ¶ 114.

⁴⁶ See Industry Analysis and Technology Division, *Numbering Resource Utilization in the United States as of December 31, 2004*, at Table 14 (Aug. 8, 2005).

⁴⁷ Rural LECs can also ask the FCC to extend the six-month compliance deadline upon demonstration of special circumstances. See 47 C.F.R. § 52.23(e).

infeasible; and (B) is inconsistent with the public interest, convenience and necessity.”⁴⁸ As the Commission has noted, many states have already granted such rural LEC suspension petitions.⁴⁹

Rural LECs cannot credibly contend that intermodal porting is not technically feasible, given that a growing number of rural LECs are supporting intermodal portability today and over one million LEC customers have already ported their number to wireless carriers. It is also difficult for rural LECs to demonstrate that a suspension of their portability obligation is necessary to avoid a significant adverse affect on “users of telecommunications services generally.” Since most competitive carriers in rural areas are already LNP capable, a rural LEC’s LNP conversion will not affect customers “generally.” Nevertheless, it is possible that, depending on its unique circumstances, a rural LEC could demonstrate that a suspension of its obligation is necessary to avoid a requirement that is “economically burdensome,” even though the Commission has developed cost recovery rules to ensure that incumbent LECs can recover their portability compliance costs.⁵⁰

Every rural LEC has a significant alternative to its statutory duty to provide intermodal portability, but Congress has decided that this alternative should be considered by states pursuant to federal criteria rather than by the FCC. Again, the existence of this alternative is separate from, and has no bearing on, the *Intermodal Porting Order*. It is rural LECs that will decide whether to file an exemption petition, and it will be State commissions that will decide whether or not to grant any petitions filed.

⁴⁸ 47 U.S.C. § 251(f)(2).

⁴⁹ See *Initial RFA* at ¶ 15.

⁵⁰ See, e.g., *Third LNP Order*, 13 FCC Rcd 11701 (1998).

C. OTHER OPTIONS ARE NO LONGER SIGNIFICANT ALTERNATIVES

Prior to the *Intermodal Porting Order*, rural LECs claimed they could unilaterally excuse themselves from their portability obligation simply by requiring wireless carriers to meet one of three preconditions: establish a point of interconnection within the rural exchange, obtain separate telephone numbers, and/or obtain a PUC-approved interconnection agreement. The Commission rejected this rural LEC position in the *Intermodal Porting Order*, and it need not – and should not – reconsider this decision in any final flexibility analysis.

The Commission in its *Intermodal Porting Order* confirmed that LECs are required to port numbers whenever “the requesting wireless carrier’s ‘coverage area’ overlaps the geographic location in which the customer’s wireline number is provisioned”:

Permitting intermodal porting in this manner is consistent with the requirement that carriers support their customers’ ability to port numbers while remaining at the same location.⁵¹

In so ruling, the Commission rejected the rural LEC argument that they should be able to exempt themselves from compliance with their statutory obligation unless a wireless carrier has a point of interconnection in their exchanges, obtains its own set of telephone numbers in the same rate center as the ported number, or has a PUC-approved interconnection contract with the rural LEC.⁵²

Rural LECs on appeal did “not challenge the merits of the order.”⁵³ As the appellate court stated:

We are not suggesting that the *Intermodal Order* is unreasonable; indeed, the [rural] petitioners do not challenge the substantive reasonableness of the rule.⁵⁴

⁵¹ *Intermodal Porting Order*, 18 FCC Rcd at 23698 ¶ 1 and 23706 ¶ 22.

⁵² *See id.* at 23707 ¶ 24 and 23711 ¶ 34.

⁵³ *USTA v. FCC*, 400 F.3d 29, 34 (D.C. Cir. 2005).

Since rural LECs did not challenge the Commission's denial of their three requested preconditions, they have now waived their right to challenge this portion of the *Intermodal Porting Order* and it is unnecessary (and would be inappropriate) for the Commission to consider these rejected alternatives in its final flexibility analysis.⁵⁵

Nevertheless, it bears noting briefly that the three preconditions that the Commission has already rejected would not have benefited rural LECs in any way:

- Wireless Numbers. Whether or not a wireless carrier has obtained its own telephone numbers from the number administrator, NANPA, in a rural LEC exchange has nothing to do with the costs a rural LEC incurs in porting a number that it obtained from NANPA to a wireless carrier. Under this rural LEC precondition, wireless carriers would have been forced to obtain millions of scarce telephone numbers that they may not otherwise need, undermining the Commission's number conservation policies.
- Point of Interconnection. A wireless carrier point of interconnection in a rural exchange would have provided no financial benefit to rural LECs.⁵⁶ This is because FCC rules require rural LECs to pay the wireless carriers for transporting the rural LEC calls "from the interconnection point between the two carriers to the termi-

⁵⁴ *Id.* at 39.

⁵⁵ Likewise, the FCC need not consider the prior rural LEC argument that number portability "creates an unfair competitive advantage over smaller ILECs by making it easier to more consumers to port numbers to larger nationwide carriers" (Initial RFA at ¶ 11), given that rural LECs on appeal did "not . . . contend that this asserted departure renders the *Intermodal Order* substantively invalid." 400 F.3d at 39.

⁵⁶ In addition, as discussed above, wireless carriers have a right under the Act to interconnect indirectly with other carriers and as a result, incumbent LECs cannot compel a wireless carrier to interconnect directly with them. In fact, the FCC held long ago that carriers can interconnect indirectly with respect to number portability. *See First LNP Reconsideration Order*, 12 FCC Rcd at 7305 ¶ 121 and n.399.

nating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.”⁵⁷ If anything, a requirement that a wireless carrier maintain an interconnection point in every rural exchange would have *limited* rural LEC flexibility in determining how to route most efficiently their customers’ calls to wireless networks – the very antithesis of small entity flexibility.

- Interconnection Agreements. The record evidence before the Commission was undisputed that interconnection agreements are not necessary before LECs can begin porting their customers’ numbers to competitive carriers; adoption of this rural LEC argument would have simply delayed needlessly the very purpose of number portability: opening markets to competition. Importantly, rural LECs have also been recently granted the right to initiate negotiations for such agreements, whether or not a wireless carrier has made a request for portability.⁵⁸

⁵⁷ 47 C.F.R. § 51.701(c). John Staurulakis, Inc. (“JSI”) recently argued that under “existing rules ILECs are not required to assume the responsibility of routing calls to a ported number to a POI outside the ILEC’s service area” and that the FCC should declare that wireless carriers “with out-of-service area POIs are operationally and financially responsible for the transport and termination of traffic outside of the ILEC’s service area.” JSI Ex Parte at 10-11 (May 2, 2005). This statement, entirely unsupported, is flatly inconsistent with Rule 51.701(c) which has been affirmed on appeal. *See also Atlas Telephone v. Oklahoma Corporation Comm’n*, 400 F.3d 1256, 1265-66 (10th Cir. 2005). To grant the relief that JSI seeks, the FCC would have to commence a new rulemaking to change Rule 51.701(c). In addition, the rulemaking that JSI effectively seeks would be pointless because, as discussed below, it was Congress that decided that transport costs should be shared. *See* 47 U.S.C. § 251(b)(5)(transport shall be subject to “reciprocal compensation arrangements”). Simply stated, the FCC does not possess the legal authority to adopt the rules that JSI wants the FCC to adopt.

⁵⁸ *See* 47 C.F.R. § 20.11(f); *Wireless Termination Tariff Order*, 20 FCC Rcd 4855 (2005).

III. THE COMMISSION SHOULD SUPPLEMENT THE STATEMENT OF NEED SECTION IN ITS FINAL FLEXIBILITY ANALYSIS

The Regulatory Flexibility Act specifies that a final flexibility analysis shall include “a succinct statement of the need for, and objectives of, the rule.”⁵⁹ The initial flexibility analysis states that the *Intermodal Porting Order* rules were adopted to “promote competition and encourage carriers to provide new services and lower prices for consumers.”⁶⁰ While this statement is certainly accurate, Sprint submits that it does not capture the underlying reason why the Commission adopted its rules.

The Communications Act unequivocally imposes on all LECs, including rural LECs, the duty to provide number portability, which the Act defines as the ability of customers to retain “at the same location” existing telephone numbers “when switching from one telecommunications carrier to another.”⁶¹ Nine years ago, the FCC confirmed that this LEC portability obligation extended to wireless carriers.⁶² At the same time, the Commission adopted Rule 52.23(c), which specifies that “[b]eginning January 1, 1999” – that is, over six years ago – “all LECs must make a long-term database method of number portability available within six months after a specific request by another telecommunications carrier in areas in which that telecommunications carrier is operating or plans to operate.”⁶³ Rural LEC obligations under the Act and implementing rules were thus clear: they have been required to provide number portability to any wireless carrier

⁵⁹ 5 U.S.C. § 604(a)(1).

⁶⁰ Initial RFA at ¶ 2.

⁶¹ 47 U.S.C. §§ 153(30), 251(b)(2).

⁶² See *First LNP Order*, 11 FCC Rcd 8352, 8357 ¶ 8 (1996) (Because “CMRS carriers are telecommunications carriers under the 1996 Act, . . . LECs are obligated under the statute to provide number portability to customers seeking to switch to CMRS carriers.”). No LEC has ever challenged this ruling.

⁶³ 47 C.F.R. § 52.23(c). See also *First LNP Order*, 11 FCC Rcd at 8469 (Rule 52.23(c) was originally codified as Rule 52.3(c)).

that made a request anytime after July 1, 1998. No LEC ever challenged on appeal any of these FCC rulings.

Numerous rural LECs, however, chose to disregard their legal obligations once they began receiving portability requests from wireless carriers. Specifically, they unilaterally imposed preconditions on their provision of number portability, including that the wireless carrier establish a point of interconnection in the rural exchange, obtain its own set of telephone numbers or wait until a PUC approved an interconnection agreement between the parties. The Commission was thus compelled to enter *Intermodal Portability Order* to reject the preconditions that rural LECs had been imposing and to remind all LECs that to meet their statutory obligation to provide portability “at the same location,” they must port numbers to any wireless carrier whose coverage area overlaps the original rate center associated with the number to be ported. While policy reasons were important in the *Intermodal Porting Order*, it was the rural LEC refusal to comply with the requirements of the Act and preexisting FCC rules that required the Commission to enter the *Order*.

IV. CONCLUSION

The SBA has stated that the Regulatory Flexibility Act does “not seek preferential treatment for small entities” and that the purpose of this Act is to ensure that rules do “not unduly inhibit the ability of small entities to compete.”⁶⁴ In this case, however, rural LECs are attempting to use this Act precisely to obtain such preferential treatment -- not to enhance their ability to compete, but to hamper their competitors. Specifically, rural LECs believe they should not be subject to the same rules that apply to all other carriers, including carriers that compete with rural

⁶⁴ *SBA Guide* at 89; SBA Reply Comments at 2 (Feb. 4, 2004). *See also* SBA Reply Comments at 3 (Feb. 4, 2004)(“The RFA does not seek preferential treatment for small entities.”).

LECs. For the reasons discussed, Sprint Nextel respectfully requests that the Commission take actions consistent with the views expressed above.

Respectfully submitted,

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